IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 255 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ESSAR STEEL LTD.

Versus

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Appearance:

1. COMPANY PETITION No. 255 of 2004

MR SN SOPARKAR Ld. Sr. Counsel with MRS SWATI SOPARKAR for Petitioner No. 1

..... for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 01/02/2005

ORAL JUDGEMENT

1. This is a petition filed under sections 78 & 100 to 103 of the Companies Act, 1956 seeking confirmation of

the scheme of capital reduction of the Company.

2. The petitioner company herein was promoted and commenced the business in the year 1976. The company is engaged in the manufacturing of steel products. However, as pointed out in greater detail in the petition, the Company has suffered losses due to adverse market conditions. Though the company has made operative profit during the current financial year, it still has huge accumulated losses. On the other hand it has substantial balance in Share Premium Account. The company has proposed to use its Share Premium Account partly in order to write off the losses reflected in the Profit and Loss Account. It is thus proposed to restructure the Balance Sheet of the Company to bring it to a realistic level.

3. By a special resolution of the company duly passed in accordance with Section 189 of the Companies Act, 156, at a general meeting thereof, held after due notice as provided in the Act on the 7th day of August, 2004, it was resolved:

"RESOLVED THAT pursuant to the provisions of Section 78, 100 to 103 and other applicable provisions, of the Companies Act, 1956, and enabling provisions in the Memorandum and Articles of Association of the Company, and subject to the confirmation of the jurisdictional High Court/Tribunal and/or any other regulatory as may be prescribed under the Companies Act, 1956 or under any other statute and approval of the Financial Institutions (Fis) and other concerned authorities, if any, and such other approvals, permissions and sanctions, as may be necessary and subject to such conditions, modifications, as may be prescribed or imposed by any of the above authorities, while granting such approvals, permissions and sanctions, which may be agreed to by the Board of Directors of the Company, an amount not exceeding Rs. 1356.30 crores in aggregate out of the balance standing in the Securities Premium Account of the Company as at April 1, 2004 be utilized for the adjustment of the sum of Rs. 1356.30 crores standing to the debit of "Profit and Loss Account" which is the brought forward losses as it stood in the books of the Company as on April 1, 2004.

RESOLVED FURTHER that for the purpose of giving

effect to the above Resolution and for removal of any difficulties or doubts, the Board of Directors (which term shall include any Committee thereof or any person/persons that the Board may have constituted/nominated or hereinafter constitute/nominate to exercise its powers, including powers conferred under this Resolution) be and is hereby authorized to do all acts, deeds, matters and things as it may, in its absolute discretion, deem necessary, expedient, usual or proper and to settle any question or difficulty that may arise with regard to utilization/adjustment of the Securities Premium account including passing of such accounting entries and / or making such other adjustments in the books of accounts as considered necessary to give effect to the above Resolution or carry out such modifications/directions as may be ordered by the jurisdictional High Court/Tribunal to implement the aforesaid Resolution."

4. It is pointed out in the petition that the proposed reduction does not involve diminution of any liability or repayment of paid up capital. In fact, there is no reduction proposed in the Equity Share Capital of the company. However, since the Securities Premium account forms the part of the capital in terms of sec. 78 of the Companies Act, 1956, the utilization of the amount lying in this account needs to be treated as Reduction of Capital. The above proposal is not likely to have any adverse impact on the networth of the Company for all practical purposes. In view of this, while admitting the Petition this Court did not give any directions as required under section 101(2) of the Act and the same were dispensed with.

5. The petition was admitted by this court on 27th December, 2004 and the same was ordered to be advertised in Vadodara edition of "Indian Express" and Surat edition of "Gujarat Mitra". The same direction has been complied with by the company and the notice of the petition has been duly advertised on 5th January, 2005 as per the affidavit dated 13th day of January, 2005 filed by the Clerk of the learned advocate for the petitioner. Pursuant to the said advertisement no one has come forward to raise any objections opposing the sanction to the proposed capital reduction.

6. On question being asked by the court as to whether sec. 78 of the Companies Act permits the company to utilize share premium account for writing off of the

loss reflected in the profit and loss account. Mr. Soparkar ld. sr. Counsel appearing with Mrs. Swati Soparkar ld. advocate for the petitioner has submitted that the conjoint reading of sub sec. (1) and (2) of Sec. 78 does envisage utilization of share premium account for writing off of the losses reflected in the profit and loss account. In this connection, Mr. Soparkar relies on the decision of the Madras High court in the case of Parry Confectionery Ltd, In re, 122 Company Cases 900, wherein the court has observed that while reading of two sub-sections of sec. 78 together, the conclusion that would follow would be that where a company proposes to apply its securities premium account in the manner provided for in sub-section (2), the provisions relating to reduction of capital would not be attracted and the company can do so without either being required to pass a special resolution or seek the confirmation of court. Section 78(2) is however not exhaustive of the methods in which the securities premium account can be applied by the company and is only exhaustive of the methods in which such application can take place without following the reduction procedure. Where, however, a company proposes to apply its securities premium account in a manner other than that contemplated in sub-section(2), then the provisions relating to reduction of share capital would have to be followed in respect of such application. Mr. Soparkar has further submitted that the special resolution passed by the company clearly shows that the restructuring will not be prejudicial to the interest of the petitioner's creditors as the reduction does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid up capital. There is no reduction in the amount payable to any of the creditors. He has further submitted that it does not involve any out flow of cash and the same will not affect the normal operations of the petitioner or its ability to honour its commitments and to pay its debts, in the ordinary course of business. He has further submitted that sec. 100 of the Companies Act empowers a company limited by shares, if so authorized by its Articles, to reduce its share capital by special resolution. The circumstances mentioned in section 100(1)(a),(b) and (c) of the Act are only illustrative and not exhaustive and it is open to a company covered under section 100 of the Companies Act to reduce its securities premium account by passing a special resolution subject to the provisions of sec. 100 to 104 of the Act. He has further submitted that procedure under sec. 102 of the Act is not applicable to the proposed reduction and this court, therefore, vide its order passed on 27.12.2004 has held

that looking to the facts of the case, the provisions of sec. 100(1)(2) shall not apply to the secured or unsecured creditors and hence an inquiry to ascertain the debts, claims and liabilities of or affecting the said company is not required to be held as the proposed reduction does not involve either the diminution of liability in respect of unpaid share capital or the payment to any share holder of any paid up capital. The court has, therefore, granted the prayer in terms of paragraph (b) of the Judges' Summons.

7. Mr. Soparkar has further relied on a decision of the Bombay High Court in the case of India Infoline Ltd., (2005)3 Comp. L.J. 134 (Bombay), wherein the court has held that considering the averments made and the object and purpose of utilization of securities premium account for writing off of accumulated losses and for reduction of equity shares, and as a special resolution has been passed and accepted by share holders unanimously and as there is no secured creditors and as unsecured creditors have given their written consent, in this background and undisputed position, and in view of the settled principle that commercial wisdom and need of the company the interference of the court should be minimum, and there is nothing illegal or against the public policy pointed out or found on record, company petition deserved to be allowed.

Mr. Soparkar has further relied on the decisions of this court in following cases:

1) Order in Company Petition No. 53/2003 in the case of Contech Software Ltd. passed on 25.3.2003.

2) Order in Company Petition No. 170/2003 in the case of Vadilal Industries Ltd. passed on 1.9.2003.

3) Order in company Petition No. 204/2003 in the case of Abuzu Holdings Pvt. ltd. passed on 25.9.2003.

4) Order in Company Petition No. 313/2003 in the case of Bell Ceramics Ltd. passed on 12.3.2004.

5) Order in Company Petition No. 70/2004 in the case of Arvind Brands Ltd. passed on 30.4.2004.

8. Having perused the petition and more particularly, the reasons given in support of proposed

reduction and having considered the judgments cited before this court, I am of the view that there is no reason not to confirm the proposed action of the petitioner to reduce its capital. The said proposal correctly brings out the real value of the assets of the Company and at the same time does not prejudicially affect any one as it does not involve extinguishments or diminution of the capital of the company nor does it involve pay off of any capital received by the Company. Accordingly, the resolution dated 7.8.2004 is hereby confirmed.

The form of the minute proposed to be registered under Sec. 103(1)(b) is as follows:

MINUTE UNDER SEC. 103(1)

The Security Premium Account of Essar Steel Limited is by virtue of a Special Resolution of the Company dated 7th August, 2004 and by virtue of the sanction granted by the High Court of Gujarat on 1st February, 2005, reduced from Rs. 1418.56 crores/- to Rs. 39.88 crores. A Special Resolution of the company has been passed to the effect that upon the said reduction of the capital taking effect, an amount not exceeding Rs. 1356.30 crores in aggregate out of the balance standing in the Securities Premium Account of the Company as at April 1, 2004 be utilized for the adjustment of the sum of Rs. 1356.30 crores standing to the debit of "Profit and Loss Account" which is the brought forward losses as it stood in the books of the Company as on April 1, 2004.

9. The petitioner is directed to publish the Notice of Confirmation of Reduction of Capital and approving of Minutes in the Vadodara edition of Indian Express - English daily and Surat edition of Gujarat Mitra- Gujarati daily, within 14 days of the registration of the order with the Registrar of Companies.

10. The petition is accordingly disposed of with no order as to costs.

(K.A. PUJ, J.)

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